FILE COPY

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 669

BENNY LUCK,

Petitioner,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

EUGENE GRESSMAN
1730 K Street, N. W.
Washington 6, D. C.
Counsel for Petitioner
(By appointment of the Court of Appeals)

March 28, 1961

INDEX

SUBJECT INDEX

Page

BRIEF FOR THE PETITIONER:

Opinion Below 1

Jurisdiction 1

Questions Presented 2

Constitutional Provisions and Statutes Involved 2

Statement 4

Summary of Argument 12

Argument 16

I. The Court of Appeals Misapplied 28 U.S.C. Sec. 1915(a) in Denying Petitioner Leave to Appeal *in Forma Pauperis* 16

a. The nature of the proceedings and judgment below 16

b. The Government's misdescription of the proceedings 19

c. The need for elaboration of the *Ellis* rule 21

d. The meaning and thrust of the *Ellis* doctrine 25

II. The Two Issues Raised on Behalf of Petitioner Were Non-Frivolous So as to Warrant an Appeal *in Forma Pauperis* 30

a. The references to petitioner's past criminal record 31

b. The constitutionality of Judge Jackson's assignment 36

(1) Petitioner's right to be tried by a constitutional court judge 38

(2) The necessity of reaching the constitutional issue 40

(3) The constitutional nature of the District Court for the District of Columbia 41

Page

(4) The legislative nature of the Court of Customs and Patent Appeals 43
(5) The impact of the 1958 designation of the Court of Customs and Patent Appeals as a constitutional court 48
(6) The constitutional incapacity of Congress to alter the status of a legislative court by a mere declaration of the court's constitutional status 55

CONCLUSION 65

TABLE OF AUTHORITIES CITED

CASES:

American Ins. Co. v. *Canter*, 1 Pet. 511 ..... 45, 54
Ayrshire Collieries Corp. v. *United States*, 331 U.S. 132 40
Bakelite Corp., Ex parte, 279 U.S. 438 ..14, 41, 43, 46, 47, 52, 53, 54, 55
Baldwin Co. v. *Howard Co.*, 256 U.S. 35 42
Barr v. *United States*, 324 U.S. 83 47
Booth v. *United States*, 291 U.S. 339 58
Boyd v. *United States*, 142 U.S. 450 31
Butterworth v. *Hoe*, 112 U.S. 50 42
Callan v. *Wilson*, 127 U.S. 540 38
Cash v. *United States*, 261 F. 2d 731 (App. D. C.) 23, 26, 27
Cash v. *United States*, 357 U.S. 219 ..... 21, 23, 26
Commissoriat a L'Energie Atomique v. *Watson*, 362 U.S. 977 63
Coppedge v. *United States*, No. 539, Misc., Oct. Term, 1960 21-22
Donegan v. *Dyson*, 269 U.S. 49 40
Ellis v. *United States*, 356 U.S. 674 ....2, 11, 12, 16, 18, 19
Evans v. *Gore*, 253 U.S. 245 ..... 39, 40
Farley v. *United States*, 354 U.S. 521 ....12, 17, 25, 31, 36
Griffin v. *Illinois*, 351 U.S. 12 16
Hansford v. *United States*, 357 U.S. 578 21

Page

Herzog v. *United States*, 75 S. Ct. 349, 99 L. Ed. 1299 26
Hill v. *United States*, 356 U.S. 704 ..... 21, 25
Irish v. *United States*, 225 F. 2d 3 (C.A. 9) 53
Johnson v. *United States*, 352 U.S. 565 25
Jones v. *United States*, 266 F. 2d 924 (App. D. C.) 23, 24, 29
Keller v. *Potomac Electric Co.*, 261 U.S. 428 42
McAbee v. *United States*, 361 U.S. 537 21
McBride v. *Teeple*, 311 U.S. 649 63
Marsh v. *United States*, 82 F. 2d 703 (C.A. 3) 35
Michelson v. *United States*, 335 U.S. 469 31
Muskrat v. *United States*, 219 U.S. 346 61
National Ins. Co. v. *Tidewater Co.*, 337 U.S. 582 48
Norwegian Nitrogen Products Co. v. *United States*, 288 U.S. 294 47
O'Donoghue v. *United States*, 289 U.S. 516 ..... 14, 38, 39, 41, 42, 47
Pacific Northwest Canning Co. v. *Skookum Packers' Assn.*, 283 U.S. 858 63
Pennekamp v. *Florida*, 328 U.S. 331 57
Pope v. *United States*, 323 U.S. 1 ..... 45, 47
Postum Cereal Co. v. *California Fig Nut Co.*, 272 U.S. 693 63
Reynolds v. *United States*, 98 U.S. 145 48
Roth v. *United States*, 77 S.Ct. 17, 1 L. Ed. 2d 34 29
Rubenfield v. *Watson*, 362 U.S. 903 63
Sklaroff v. *Skeadas*, 76 S.Ct. 736, 100 L. Ed. 1524 29
Smith v. *United States*, 358 U.S. 281 21
Smith v. *United States*, 361 U.S. 38 21
Texas Co. v. *Roos*, 93 F. 2d 380 (C.A. 5) 26
Toth v. *Quarles*, 350 U.S. 11 ..... 14, 39, 42
United States v. *American-Foreign SS. Co.*, 363 U.S. 685 ..... 14, 40
United States v. *Apuzzo*, 245 F. 2d 416 (C.A. 2) .. 33, 35
United States v. *Curzio*, 179 F. 2d 380 (C.A. 3) .. 35
United States v. *Duell*, 172 U.S. 576 42
United States v. *Giallo*, 227 F. 2d 207 (C.A. 2) 34
United States v. *James*, 208 F. 2d 124 (C.A. 2) 36

Page

United States v. *Johnson*, 327 U.S. 106 28
United States v. *Modern Reed & Rattan Co.*, 159 F. 2d 656 (C.A. 2) 35
United States v. *Nudelman*, 207 F. 2d 109 (C.A. 3) 26
United States v. *Stromberg*, 268 F. 2d 256 (C.A. 2) 33, 35
United States v. *Tomaiolo*, 249 F. 2d 683 (C.A. 2) 32, 34
United States v. *Tramaglino*, 197 F. 2d 928 (C.A. 2) 34
United States v. *United Mine Workers*, 330 U.S. 258 57
Ward v. *United States*, 76 S. Ct. 1063, 1 L. Ed. 2d 25 25
Williams v. *Georgia*, 349 U.S. 375 28
Williams v. *United States*, 289 U.S. 553 ..... 14, 44, 47, 52
Willis v. *United States*, 362 U.S. 216 21

CONSTITUTIONAL PROVISIONS:

Article III, Section 1 ..... 3, 39

STATUTES AND REPORTS:

36 Stat. 105 43
45 Stat. 1475 63
46 Stat. 762 46
47 Stat. 382, 402 46
72 Stat. 848 48
28 U.S.C. §171 52
28 U.S.C. §211 ..... 3, 49, 64
28 U.S.C. §251 52
28 U.S.C. §294(d) 13, 14, 36, 41, 58
28 U.S.C. §371(b) 40
28 U.S.C. §1492 61
28 U.S.C. §1915(a) 2, 16, 22, 25, 31
28 U.S.C. §2509 61
22 D.C. Code §2901 4
S. Rep. No. 2309, 85th Cong., 2d Sess. 41, 49, 54

Page

H. Rep. No. 695, 83rd Cong., 1st Sess. 52, 53, 57
H. Rep. No. 2348, 84th Cong., 2d Sess. 52, 56
99 Cong. Rec. 8943-4 61
104 Cong. Rec. 16095 ..... 51, 56
104 Cong. Rec. 17548-9 51

MISCELLANEOUS:

Annotation, 1 L. Ed. 2d 1964 24
Moore, Federal Practice (2d ed., 1960) 42, 53
Note, 68 Harv. L. Rev. 527 (1955) 61
Note, 69 Harv. L. Rev. 760 (1956) 53
Ridge, The Indigent Defendant, 24 F.R.D. 241 22

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 669

BENNY LURK,

Petitioner,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

Opinion Below

The Court of Appeals for the District of Columbia Circuit rendered no opinion. It merely entered an order, R. 34, stating that upon consideration of the petition for leave to prosecute an appeal *in forma pauperis* and of the memoranda in support and the opposition "the petition for leave to prosecute an appeal *in forma pauperis* is denied."

Jurisdiction

The judgment of the Court of Appeals was entered on September 23, 1960, R. 34, and the petition for a writ of certiorari was filed on October 21, 1960. The petition, to-

gether with the motion for leave to proceed *in forma pauperis*, was granted on January 23, 1961. R. 35; 365 U.S. 802. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

Questions Presented

1. Whether the Court of Appeals, in denying petitioner leave to prosecute an appeal *in forma pauperis*, has applied 28 U.S.C. §1915(a) in a manner inconsistent with the standards set forth in *Ellis v. United States*, 356 U.S. 674.

2. Whether allegations (1) that references at the trial to petitioner's past criminal record constituted plain reversible error, and (2) that the assignment of a retired judge of the Court of Customs and Patent Appeals to the trial of a criminal case raises serious constitutional issues, constitute "not plainly frivolous" issues so as to require the allowance of an appeal from the conviction *in forma pauperis*.*

Constitutional Provisions and Statutes Involved

Section 1915, Title 28, United States Code:

(a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.

* The Court may deem it appropriate to decide the merits of at least the second of the two allegations, relating to the constitutionality of the trial judge's assignment, at this juncture.

An appeal may not be taken *in forma pauperis* if the trial court certifies in writing that it is not taken in good faith.

* * * * * *

(d) The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

* * * * * *

Section 211 as amended, Title 28, United States Code:

The President shall appoint, by and with the advice and consent of the Senate, a chief judge and four associate judges who shall constitute a court of record known as the United States Court of Customs and Patent Appeals. Such court is hereby declared to be a court established under article III of the Constitution of the United States.

Constitution of the United States, Article III, Section 1:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Statement

Petitioner was indicted, tried and found guilty in the United States District Court for the District of Columbia on the charge that he had stolen from one Charles C. Edgeworth certain property, including cash, of the value of about $58.31, in violation of 22 D.C. Code §2901.[1] Following the jury trial, petitioner was duly sentenced to a prison term of not less than 4 years and 9 months and of not more than 14 years and 3 months. R. 18.

The trial was conducted on March 22, 1960, by Judge Joseph R. Jackson, R. 1, a retired member of the Court of Customs and Patent Appeals, see 193 F. 2d XV, acting on assignment for the year 1960 to the United States District Court for the District of Columbia. That assignment, a copy of which was filed in the office of the clerk of the District Court on December 8, 1959, reads as follows:

> DESIGNATION OF A RETIRED JUDGE OF THE COURT OF CUSTOMS AND PATENT APPEALS TO SERVE AS A DISTRICT JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA
>
> The Chief Judge of the United States Court of Appeals for the District of Columbia Circuit having certified that there is a necessity for the designation and assignment of a retired judge on the Roster of Senior Judges to serve as a district judge of the United States District Court for the District of Columbia during the

---

[1] "Whoever by force or violence, whether against resistance or by putting in fear, shall take from the person or immediate actual possession of another anything of value is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years."

period beginning January 1, 1960, and ending December 31, 1960; and the Honorable Joseph R. Jackson, Retired Judge of the Court of Customs and Patent Appeals, whose name appears upon the Roster of Senior Judges as available for duty from time to time in the United States Court of Appeals for the District of Columbia Circuit and the United States District Court for the District of Columbia, having expressed his willingness to undertake the performance of such judicial duties beginning January 1, 1960, and ending December 31, 1960;

Now, THEREFORE, pursuant to the authority vested in me by Title 28, United States Code, Sec. 294(d), I do hereby designate and assign the Honorable Joseph R. Jackson to serve as a district judge of the United States District Court for the District of Columbia and discharge the official duties thereof beginning January 1, 1960, and ending December 31, 1960, and for such further time as may be required to complete unfinished business.

/s/ Earl Warren
Chief Justice of the United States

Dated: Dec. 7, 1959

A similar designation of Judge Jackson to serve as a judge of the District Court from January 1 to December 31, 1961, has been signed by the Chief Justice and filed in the District Court.

Petitioner, who had been represented at the trial by a court-appointed counsel, filed a *pro se* motion for leave to appeal *in forma pauperis*. This motion was denied by Judge Jackson "as plainly frivolous and not made in good faith." R. 18. Petitioner thereupon filed a *pro se* petition in the Court of Appeals for leave to appeal *in forma pau-*

peris. The undersigned counsel was appointed by the Court of Appeals to represent the petitioner and to file a memorandum in support of the petition. R. 9. Counsel thereafter filed a motion for production of the trial transcript. R. 10. Over the objection of the United States, this motion was granted and a transcript was ordered prepared at the expense of the United States and furnished to petitioner. R. 12. That transcript is part of the certified record before this Court.

On August 31, 1960, counsel filed on behalf of petitioner a memorandum in support of the petition for leave to prosecute an appeal *in forma pauperis*. R. 13-29. The United States filed a brief opposition to that memorandum on September 16. R. 30-31. And on September 19, petitioner's counsel filed a short reply memorandum. R. 32-33. Based upon the foregoing memoranda and opposition and without hearing any oral argument, the Court of Appeals on September 23, 1960, ordered "that the petition for leave to prosecute an appeal *in forma pauperis* is denied." R. 34. No opinion was written. The panel of the court that took such action was composed of Chief Judge Wilbur K. Miller and Judges Bastian and Burger. R. 34.

As indicated in the transcript of the trial on file with the Clerk of this Court, this case involved an alleged robbery of one Charles C. Edgeworth by two or more individuals in a Washington, D. C., restaurant. Only the petitioner was identified and tried. A detailed summary of the evidence at the trial is to be found in the memorandum submitted on behalf of the petitioner in the court below and reproduced in the printed record before this Court. R. 14-16. Suffice it here to say that the prosecution witnesses were Edgeworth (who testified as to the events surrounding the robbery and petitioner's subsequent arrest), a restaurant waitress (who testified that she saw someone rob Edge-

worth); and two police officers (who testified briefly as to the events leading to petitioner's arrest). The petitioner did not take the stand himself, counsel expressly waiving the right to do so, and no witnesses were presented on his behalf.

For present purposes the following colloquies and statements at the trial are to be noted:

(*Direct examination of Edgeworth by Assistant United States Attorney*, R. 2-3.)

Q. Now, Mr. Edgeworth, have you known the defendant prior to this day, December 14, 1959?

A. I didn't know his name, but I knew his face.

Q. You had seen him before, correct?

A. Yes, sir.

Q. Where had you seen him?

A. In Occoquon.[2]

Mr. Warner: I think we should strike that answer, Your Honor, I didn't realize that was the case.

The Court: It may be stricken.

* * * * *

(*Cross-examination of Edgeworth by petitioner's appointed counsel*, R. 3.)

Q. And what did you do at headquarters?

A. I described the man to them and told them what happened.

Q. And you told them that you knew this man; is that correct?

---

[2] The references throughout the trial transcript are to "Occoquon". The correct spelling of that word is "Occoquan" and it refers to the Occoquan Workhouse, a well-known prison for District of Columbia prisoners.

A. I told them I knew his face but didn't know his name.

Q. I believe you mentioned that you knew this man at Occoquon; is that right?

Mr. Warner: I think that answer has been stricken from the record, Your Honor.

The Court: The question may be stricken.

Mr. Cole: Your Honor, I believe I have a right to ask where he knew this man.

The Court: If this man has a record all right. Why do you mention Occoquon?

Mr. Cole: Of course, we are not introducing his record at this time, but I think—

The Court: Why don't you ask him where he saw him first?

* * * * * *

(*Cross-examination of Edgeworth by petitioner's appointed counsel*, R. 5.)

Q. You have seen Benny Lurk other than those times?

A. Yes.

Q. I thought you just got through—

The Court: He told you yes, he saw him. Now pursue your question.

The Witness: Me and Benny done a year in Occoquon, that is why I knew him.

Q. What were you charged with?

A. Assault.

Q. You did a year at Occoquon?

A. That is right.

Q. You saw Benny there, you say?

A. Yes, I used to be the food adviser.

* * * * *

(*Closing argument by petitioner's appointed counsel*, R. 6.)

These are the facts as we have heard them from the stand from the mouth of the only witness who has identified Benny Lurk. And what kind of witness do we have? We have a witness who himself is a convicted criminal. I don't know why he identified Benny Lurk. He may have a grudge against him. He said he has known him for 4 or 5 years. And then we have this situation, over 6 weeks passes by and then suddenly one day Mr. Edgeworth, the complaining witness, sees Benny Lurk, the face that he never forgets, and he calls the police and they come. And they take Benny Lurk to headquarters.

* * * * *

(*Judge's charge to jury*, R. 6.)

The Court instructs you that you are to draw no inferences whatsoever as to the guilt of the defendant from the fact that the complaining witness, Mr. Edgeworth, testified that he and the defendant met at Occoquon.

Testimony by the complaining witness in that respect is to be considered only in as far as it affects his credibility as a witness.

The law does not compel any defendant to take the witness stand and testify. Therefore, no presumption of guilt may be raised and no inference of any kind may be drawn from the failure of the defendant to testify. The defendant is under no obligation to testify when he is being tried.

* * * * *

In addition, a report on a pre-trial hearing before a United States Commissioner was part of the District Court

file and was available to the Government prosecutor at the time of the trial. R. 13-14. That report summarized the preliminary testimony of the complaining witness Edgeworth in the following manner (R. 13-14):

> "... on Dec. 14, 1959 while in 'Miss Jones' restaurant between 10 and 10:30 P.M., waiting for a carry out food order, the def. and another man came into the place; *that he knows the Def. because he served a year in Jail with the Def;* that the other man stuck a knife into him and said don't move; that while he was being held at knife point, the Def. went into his pockets and removed his money and also took his eyeglasses; that he was cut in the hand by the knife and the Def. and the other man ran out; that he went home and called the police" (Emphasis added).

Thus it should have been evident to the Government prosecutor, when he asked Edgeworth where he had first met petitioner, that Edgeworth would likely answer that they had first met in jail while both were serving time for criminal offenses.

Based upon the foregoing matters of record, counsel for petitioner submitted to the Court of Appeals a memorandum contending that two non-frivolous issues were present so as to entitle petitioner to pursue his appeal *in forma pauperis*.[3] R. 13-29. Those two issues were: (1) whether the references at the trial to petitioner's past criminal record and the failure of the trial judge to give proper admonishments to the jury respecting such references constituted plain reversible error, and (2) whether a retired legislative court

---

[3] In counsel's opinion, the five questions submitted *pro se* by petitioner, R. 8-9, were either without merit or were subsumed under the first issue tendered by counsel relative to the references at the trial to petitioner's earlier criminal record. See R. 19, n. 1.

judge could constitutionally be assigned to preside over a criminal trial in an Article III court. No effort was made by counsel to explore or brief fully all aspects of these issues. His position simply was that the rule of *Ellis* v. *United States*, 356 U.S. 674, had been satisfied—that certain issues had been presented that were "not plainly frivolous" so that petitioner's request to appeal *in forma pauperis* "must be allowed." See R. 28-29.

In opposition, however, the United States contended that both issues lacked merit and substantiality. R. 30-31. But no attempt was made to demonstrate that these issues were frivolous within the meaning of the *Ellis* case. Indeed, that failure called forth a reply memorandum by petitioner's counsel, R. 32-33, pointing out that the denial of the merits of the issues was not relevant at this posture of the case, that the sole question now was whether these issues —regardless of their ultimate or seeming merit—were so frivolous in nature as to warrant dismissal had the appeal been brought by a non-indigent litigant.

On the basis of the foregoing memoranda and without hearing any oral argument, the Court of Appeals entered a summary order denying the petition for leave to prosecute an appeal *in forma pauperis*. No opinion was rendered.

The petition for a writ of certiorari was thereupon duly filed in this Court. In its brief opposing the petition, the United States contended (p. 5) that the Court of Appeals had, "in effect, granted and considered petitioner's appeal *in forma pauperis*, since it granted a transcript at government expense and the issues presented were briefed on the merits" so that the petition "should therefore be considered by this Court on the strength of the substantive issues presented." On that premise, the United States argued that

(1) the first contention as to the trial references to petitioner's past criminal record "is without merit", and (2) the contention as to the constitutionality of assigning Judge Jackson to the District Court to preside over a criminal trial was without substance since Congress in 1958 had declared the Court of Customs and Patent Appeals, from which Judge Jackson had retired, to be a constitutional court. No word was said in the brief of the United States as to either issue being frivolous in nature within the meaning of *Ellis* v. *United States*, 356 U.S. 674, so as to justify the denial below of leave to appeal *in forma pauperis*.

Summary of Argument

The Court of Appeals, in denying petitioner leave to appeal *in forma pauperis* in the light of the contention by the Government that the issues raised were without merit, contravened the rule of *Ellis* v. *United States*, 356 U.S. 674, that leave to appeal may be denied only if the issues raised are frivolous. The continued refusal of the Court of Appeals to recognize and apply the *Ellis* principle calls for an elaboration and further delineation of that principle.

In any event, two issues were raised on behalf of petitioner which could not be considered frivolous under the *Ellis* standard and hence leave to appeal should have been granted. These two issues were:

(1) Were the trial reference to petitioner's past criminal record so prejudicial as to warrant reversal of the conviction in the absence of objections at the trial, where petitioner did not take the stand? Were the instructions to the jury adequate? Precisely these types of questions were held to constitute non-frivolous issues in *Farley* v. *United States*, 354 U.S. 521, 522.

(2) Was it constitutional under Article III for Congress to seek to authorize, 28 U.S.C. §294(d), the Chief Justice of the United States to assign to the District Court of the United States for the District of Columbia a judge who had retired in 1952 from the Court of Customs and Patent Appeals? Was it enough to satisfy the Constitution that Congress in 1958 declared the Court of Customs and Patent Appeals to be a constitutional or Article III court in place of its previous status as a legislative court? Such constitutional questions are obviously substantial and unresolved. They cannot properly be termed frivolous.

As to the first issue, the non-frivolousness and indeed the substantiality are evident from even a cursory examination of its various facets. Here the prosecutor had available a report by the United States Commissioner showing that the complaining witness, if asked where he had met petitioner, would likely reply that they had served time together in prison. Yet the prosecutor asked a question that brought forth that reply. And the matter was subsequently referred to by the court-appointed defense counsel, the judge and the complaining witness—all without adequate admonitions to the jury to disregard this prejudicial evidence. In such a chain of circumstances, it is doubtful if it was enough for the judge merely to strike, rather cryptically, the first two references to the prior prison record and then charge the jury that it was not to draw any inferences of guilt from this evidence. Decisions of appellate courts firmly establish the possibility of error in these circumstances even where, as here, no objections to the evidence were made during the trial.

As to the second issue, the following propositions not only establish the non-frivolousness of the question but also demonstrate that a retired legislative court judge

cannot constitutionally preside over a criminal trial in an Article III Court:

(1) Petitioner, as a District of Columbia inhabitant, had a constitutional right to be tried for a felony crime before a judge possessing Article III judicial power. *O'Donoghue* v. *United States,* 289 U.S. 516, 540; *Toth* v. *Quarles,* 350 U.S. 11, 15. And petitioner, as a person convicted in a court presided over by a legislative court judge, has standing to raise this issue. See *United States* v. *American-Foreign SS. Corp.,* 363 U.S. 685.

(2) The challenge thus made must be in constitutional terms since the assignment statute, 28 U.S.C. §294(d), seems plainly to authorize the kind of assignment here in question.

(3) The United States District Court for the District of Columbia, while capable of exercising certain non-judicial powers, is primarily a constitutional or Article III court, exercising the Article III judicial power of the United States. *O'Donoghue* v. *United States,* 289 U.S. 516.

(4) The Court of Customs and Patent Appeals, on the other hand, has been determined by this Court to be a legislative court, exercising only such powers as could have been exercised by executive officers of the Government. *Ex parte Bakelite Corp.,* 279 U.S. 438; *Williams* v. *United States,* 289 U.S. 553. As a legislative court, it is "incapable of receiving" any of the Article III judicial power of the United States. And its judges are likewise incapable. Hence such judges cannot be assigned to perform Article III power.

(5) The 1958 effort of Congress, declaring the Court of Customs and Patent Appeals to be a constitutional court, was ineffectual to change the nature of that court. The

1958 amendment was premised on the continuation without change of the structure, organization and jurisdiction of this court; thus it did not pretend to add any powers to the court or its judges that could be described as Article III powers.

(6) In the absence of any addition of Article III powers to the court or its judges, Congress cannot change what this Court has definitively determined to be the legislative nature of the Court of Customs and Patent Appeals. Here, Judge Jackson was nominated and confirmed as a legislative court judge, performed legislative court duties for 14½ years, and then retired in 1952. Never was it thought that he had, by virtue of his appointment or service, any Article III powers. It is inconceivable that six years later Congress can change his status from that of a retired legislative court judge to a retired Article III court judge—all without attempting to alter or change the powers which he acquired as a member of the Court of Customs and Patent Appeals. Hence it must be concluded that the assignment here was not constitutionally authorized.

In the event that this Court deems it appropriate to resolve the aforesaid constitutional issue at this juncture, rather than remanding for a decision on that issue by the court below, a full discussion of the question is presented hereinafter.

But whatever the disposition to be made by this Court, the fact remains that, despite the Government's contention to the contrary, the petitioner was denied a full review of his conviction. And because two non-frivolous issues were presented on his behalf, the denial of the petition to appeal *in forma pauperis* was plain error by the court below.

ARGUMENT

The essence of this case, as it reaches this Court, is whether indigent prisoners are to be accorded the same appeal rights in the federal court system as are given to convicted individuals possessing resources to finance their own appeals.

The answer to that question should be obvious. As was stated in *Griffin* v. *Illinois*, 351 U.S. 12, 19, "Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts." Yet that simple principle has been repeatedly ignored by the Court of Appeals for the District of Columbia Circuit in passing upon applications to appeal *in forma pauperis* under 28 U.S.C. §1915(a) from criminal convictions. This case represents a particularly flagrant instance of this propensity to do violence to the principle of equality of appeal rights as between the poor and the pecunious.

I.

The Court of Appeals Misapplied 28 U.S.C. §1915(a) in Denying Petitioner Leave to Appeal in Forma Pauperis.

a. *The nature of the proceedings and judgment below*

In *Ellis* v. *United States*, 356 U.S. 674, this Court enunciated *per curiam* the controlling principles to guide the lower federal courts in treating petitions for leave to appeal *in forma pauperis* under 28 U.S.C. §1915(a):

> "The only statutory requirement for the allowance of an indigent's appeal is the applicant's 'good faith'. 28 U.S.C. §1915. In the absence of some evident im-

> proper motive, the applicant's good faith is established by the presentation of any issue that is not plainly frivolous. *Farley* v. *United States*, 354 U.S. 521. The good-faith test must not be converted into a requirement of a preliminary showing of any particular degree of merit. Unless the issues raised are so frivolous that the appeal would be dismissed in the case of a nonindigent litigant, Fed. Rules Crim. Proc. 39(a), the request of an indigent for leave to appeal *in forma pauperis* must be allowed."

Acting upon those principles, petitioner's court-appointed counsel sought to raise two issues of a non-frivolous nature, without attempting to brief them fully or to demonstrate their ultimate merit. The first of these issues involved the assertion that, since petitioner had not taken the stand, plain error may have been committed by the trial court by its failure to take proper corrective action relative to certain evidence concerning petitioner's prior criminal record. Precisely that type of issue was characterized by this Court in *Farley* v. *United States*, 354 U.S. 521, 522, as non-frivolous. And the second issue raised on behalf of petitioner concerned the constitutionality of assigning a retired legislative court judge to conduct a criminal trial in a constitutional or Article III court. Since that constitutional issue was both important and unresolved, its non-frivolous nature seemed beyond dispute.

The response of the United States to these two issues in the court below was solely to challenge their merit, not their frivolousness. The circumstances surrounding the questions and answers as to petitioner's past criminal record, said the Government (R. 30), were not such as to "constitute the plain error necessary for review in the absence of objection." And, after arguing that a retired legis-

lative court judge could under the peculiar statutory circumstances be assigned to try a criminal case in the District Court, the contention was made (R. 31) that "the premise of appointed counsel's argument falls and, with it, the conclusion that a substantial question is presented." In other words, since the issues were thought to lack merit the conclusion was drawn that they also lacked substantiality.

As was noted in the reply memorandum filed on behalf of the petitioner (R. 32), the Government's denial of the merits of these two issues was not relevant at this juncture. Under the *Ellis* ruling, 356 U.S. at 675, an *in forma pauperis* application need not make "a preliminary showing of any particular degree of merit." It is enough if the issues are non-frivolous. And significantly, the Government has not in terms argued that the two issues were frivolous.

Since the order of the court below denying leave to appeal *in forma pauperis* was by its terms based solely upon "consideration of the petition for leave to prosecute an appeal in forma pauperis and of the memoranda in support and the opposition" (R. 34), it is fair to interpret the order as approving, or at least as motivated by, that opposition by the Government. The court below did what the *Ellis* decision said it should not do. Like the Government, it converted the "good faith" test of 28 U.S.C. §1915 into a requirement of a preliminary showing of some degree of merit and insisted that there be substantiality to the questions presented. And because the court, following the Government's contention, apparently believed that these two issues lacked both merit and substance—and therefore were frivolous—petitioner was denied his right to appeal *in forma pauperis*. The error of the court in so holding is obvious.

b. *The Government's misdescription of the proceedings*

In its opposition to the petition for certiorari, the United States took the position (p. 5) that the court below had, "in effect, granted and considered petitioner's appeal *in forma pauperis*, since it granted a transcript at government expense and the issues presented were briefed on the merits." The argument was accordingly made that the petition to this Court should be considered "on the strength of the substantive issues presented."

Such a description of what "in effect" happened in the Court of Appeals is wholly at variance with the facts. While that court did order the transcript prepared at government expense, it did so on appointed counsel's motion (R. 10-11). And that motion was expressly premised (R. 11) on counsel's need for the transcript in order to determine if the appeal was frivolous and in order to fulfill counsel's duty under *Ellis* v. *United States*, 356 U.S. 674, to represent petitioner "in the role of an advocate." The court's order granting the transcript (R. 12) simply stated that an appeal *in forma pauperis* was allowed only "to the extent of having the transcript . . . prepared without costs . . ." The request for leave to appeal was never granted in any other manner and no indication was ever given that the merits of any issue raised were to be considered by the court.

Moreover, the Court of Appeals never ordered that the full record of proceedings in the District Court be brought before it—as would normally happen if the appeal were allowed. Petitioner's counsel made no effort to explore and brief fully all the aspects of the two issues which he raised. And the Government's response (R. 30-31) was even less elaborate. No oral argument was had before the court and no opinion or order was rendered which would indicate

that the court felt it was treating the case as submitted on the merits of the two issues.[4] The Court of Appeals simply ordered (R. 34) that "the petition for leave to prosecute an appeal in forma pauperis is denied."

Despite the Government's denial, the simple fact is that the Court of Appeals has denied petitioner full appellate review of his conviction. In denying that review, the court apparently followed the arguments presented on behalf of the United States and concluded—without the benefits of a full scale review—that the issues raised lacked either substance or merit. In so doing, as petitioner contends, the court acted contrary to the *Ellis* ruling. But even that error was not premised in theory or in fact upon the grant of full appellate review.

Indeed, if the Government's version of the events below were true, the error of the action of the Court of Appeals is compounded ten-fold. The simple standard set forth in the *Ellis* case forbids any "requirement of a preliminary showing of any particular degree of merit" as to issues raised on behalf of those seeking leave to appeal *in forma pauperis;* only the frivolousness of such issues is to be considered. But if, by the process of securing a transcript and arguing at sufficient length to demonstrate the non-frivolousness of the issues raised, an indigent prisoner is to be held to have had his appellate day in court, then all meaning has been drained from the *Ellis* case. And appellate counsel must then proceed at the risk of saying too much and thereby cutting off his client's right to full review on the merits. This would mean that counsel for rich appellants would have the right to proceed fully to brief.

---

[4] The case at all times remained on the court's miscellaneous docket as No. 1481 and was never transferred to the regular appellate docket and renumbered, as would happen if the petition for leave to appeal had been granted.

and argue their cases orally, but counsel for indigent prisoners could be denied that right. The invalidity of that discrimination is plain.

The ultimate fact is that the Government's version of the proceedings below is at odds with what actually happened and is flatly contradicted by Section 1915 as interpreted by the *Ellis* case. It was reversible error for the court to consider the merits or substantiality of the issues under the guise of considering their frivolousness. But at least the court must be credited with an effort to comply with the *Ellis* standard, however misplaced that effort may have been. To suggest, as the Government has done, that the court abandoned all pretense of following the *Ellis* rule and gave petitioner a full appellate review is to suggest an even more egregious error. Never has it been thought that a petition for leave to appeal *in forma pauperis* and supporting memoranda could, without more, constitute full appellate review. Nothing in the language or purpose of Section 1915 makes such a result in any way tolerable.

c. *The need for elaboration of the Ellis rule*

The action of the court below in this case, as well as the position taken before that court and before this Court by the United States, clearly demonstrates the need for underscoring and elaborating the rule of the *Ellis* case. Time and again this Court has had to require the Court of Appeals for the District of Columbia to reconsider its actions in the light of *Ellis*. See *Hill* v. *United States*, 356 U.S. 704; *Cash* v. *United States*, 357 U.S. 219; *Hansford* v. *United States*, 357 U.S. 578; *Smith* v. *United States*, 358 U.S. 281; *Smith* v. *United States*, 361 U.S. 38; *McAbee* v. *United States*, 361 U.S. 537. Cf. *Willis* v. *United States*, 362 U.S. 216. And see *Coppedge* v. *United States*, now pending before this Court on petition for certiorari, No.

539 Misc., October Term, 1960. Apparently, then, not all of the judges of the court below have yet understood all of the implications and requirements of the *Ellis* rule in passing upon petitions for leave to appeal *in forma pauperis*.[5]

The experience of many of the counsel who have been called upon by the court below to represent petitioners seeking to appeal *in forma pauperis* has often been a frustrating one in terms of the *Ellis* rule. Far too frequently these appointed counsel are met by arguments by the United States that the issues they seek to raise are without "merit" or "substance." On other occasions, the answer may be that the issues are "frivolous" in the sense of being without merit or substance. The continuing number of *per curiam* orders denying leave to appeal, especially in those cases (such as the instant one) where the Government's argument has been in terms of "merit" or "substance", has created an uneasy feeling that the *Ellis* rule and the whole purpose of Section 1915(a) are being eroded.

The importance of this problem is not to be underestimated. The Court of Appeals for the District of Columbia is probably met with more requests for leave to appeal

---

[5] See remarks of United States District Judge Albert A. Ridge of the Western District of Missouri, *The Indigent Defendant*, 24 F.R.D. 241, 247: "Because of the importance of those subjects, it is to be regretted that the Supreme Court did not spell out more clearly its philosophical approach to those matters in its *per curiam* opinions. Had it done so, the lower courts would have been given a clearer understanding of the procedural approach to the problem, and the equations now to be used in disposition of *in forma pauperis* appeals without being cast into a quandary. Irrespective of the lack of complete elucidation by the Supreme Court, if the pall of our dilemma is to be dispersed, it is apparent that the lower courts must ascertain what the philosophy of the Supreme Court is, upon which the Johnson and Farley cases are rested."

in forma pauperis than any other federal appellate court in the country. The criminal jurisdiction of the District of Columbia courts, covering both federal and local or District crimes, results in far more indigents seeking to appeal their convictions than is the case in any other federal judicial district. The sheer volume of these District of Columbia cases, therefore, has presented the problem in its most dramatic and continuing form—the problem of the proper standard to apply in passing upon petitions to appeal *in forma pauperis*. And it is a problem that apparently has sharply split the Court of Appeals, a split that continues up to the present day. Strongly held views have been expressed, some of which are at complete variance with this Court's ruling in the *Ellis* case. See, e.g., the various opinions in *Cash* v. *United States*, 261 F. 2d 731 (App. D. C.), certiorari granted and judgment vacated, 357 U.S. 219.

From the records in the clerk's office of the Court of Appeals, it appears that during the 1960 fiscal year (July 1, 1959, to June 30, 1960) about 43 *in forma pauperis* petitions were filed, seeking to appeal directly from criminal convictions.[8] Of these 43 petitions, 13 were granted and 30 denied. These statistics are in contrast to earlier ones compiled by Circuit Judge Bazelon in *Jones* v. *United States*, 266 F. 2d 924, 926 (App. D. C.). He there noted that from November 1957 up to about the time of his opinion (April 30, 1959), 47 *in forma pauperis* petitions for leave to appeal from criminal convictions had been filed; of those 47 petitions, 31 were granted. Ultimately, though,

[8] During the 1960 fiscal year, a total of about 240 *in forma pauperis* applications came before the Court of Appeals. Of those 240, about 180 arose on petitions for leave to appeal *in forma pauperis* after such leave had been denied by the District Court, and the other 60 were cases where such leave had been granted by the District Court. Out of the 180 petitions, which included habeas corpus matters, 13 were granted and 30 denied in cases of direct appeal from criminal convictions.

in most of the cases in which leave was granted the convictions were affirmed on the merits. Judge Bazelon then continued (266 F. 2d at 926-7):

> "But there are many meritorious appeals among them, and a substantial number result in reversals. If, because of the Supreme Court's Ellis decision, we are allowing more criminal appeals in forma pauperis, it is probable that these include a larger number of *meritorious* appeals.
>
> "From September 1, 1957, through February 28, 1959, we decided 24 appeals in which we had granted leave to appeal in forma pauperis although the District Court had previously denied leave on the ground that the appeal lacked merit. *We reversed the convictions in 11 of these 24 cases.* In 6 of the other cases the convictions were affirmed by split decisions. Thus in 17 of the 24 cases at least one judge of this court thought the conviction should be reversed. In all 17 of these cases, the Government opposed the petitions for leave to appeal in forma pauperis.
>
> "A free society should be ready to assume the burden of infinitely more than 24 appeals to avert 11 miscarriages of justice. Concern for our docket should not attenuate the right of every indigent to point out, with the aid of counsel, what may prove to be errors. If time of bench and bar is spent in review of cases lacking in merit, it is the price we must pay for a system of justice that shields the poor man from 'invidious discriminations.' We cannot review the cases which prove to have merit without reviewing some which may not." [Emphasis in original.]

Such, then, is the nature and the measure of the problem in the Court of Appeals for the District of Columbia Circuit. See, generally, Annotation, 1 L. Ed. 2d 1964.

d. *The meaning and the thrust of the Ellis doctrine*

Since some elaboration of the *Ellis* doctrine seems in order, it is necessary to state just what the doctrine is. Section 1915(a) very simply says that an appeal may be taken *in forma pauperis* if taken in "good faith." And the *Ellis* case sought to interpret that "good faith" standard by establishing two criteria: (1) the absence of some evident improper motive; (2) the presentation of any issue that is not plainly frivolous.[7] The criteria of non-frivolousness was further refined to mean: (a) it is not the equivalent of a requirement of a preliminary showing of any degree of merit; (b) but it is the equivalent of the rule as to dismissal of frivolous prepaid appeals under Rule 39(a) of the Federal Rules of Criminal Procedure.

The problem becomes primarily one of putting some meat on the concept of frivolousness. To that end, several considerations are in order:

(1) The concept of frivolousness is *not* the equivalent of lack of merit or lack of substantiality in the questions presented. As Mr. Justice Frankfurter noted, in considering an application for bail, *Ward* v. *United States*, 76 S. Ct. 1063, 1 L. Ed. 2d 25, there is a qualitative difference between the concepts of "frivolous" and "lack of a substantial question." And, indeed, the Solicitor General has advised this Court in an earlier case, *Hill* v. *United States*, 356 U.S. 704,[8] that the United States agrees that there is such a

[7] Earlier expressions by this Court that frivolousness is the prime standard for weighing the issues presented in a petition filed under Section 1915 are to be found in *Johnson* v. *United States*, 352 U.S. 565, 566, and *Farley* v. *United States*, 354 U.S. 521, 522.

[8] Brief of the United States in opposition to the petition for certiorari in the *Hill* case, Misc. No. 287, October Term 1957, p. 7.

distinction and that "frivolity" is not to be confused with "lack of a substantial question."[9]

That the term "frivolous" is not to be equated to "without merit" is made strikingly clear in *Texas Co.* v. *Roos*, 93 F. 2d 380 (C.A. 5), and *United States* v. *Nudelman*, 207 F. 2d 109 (C.A. 3). In both cases the appellee moved to dismiss the appeal as frivolous. In the earlier case the Fifth Circuit stated, "We think the appeal is without merit, but are unable to say that it is frivolous or was taken only for delay." 93 F. 2d at 383. In the later case the Third Circuit said merely, "Such a motion cannot be granted since the appeal was directed to the merits." 207 F. 2d at 109. The court permitted the appellee to amend its motion to one for summary judgment of affirmance of the appeal and granted the motion.

The reasons are even clearer why these terms should not be equated in cases involving the grant or denial of leave to appeal *in forma pauperis*. With regard to what is a "substantial question," for the now outmoded purposes of determining whether to permit release of the applicant on bail pending review, under Federal Criminal Rule 46(a)(2) before its amendment, Mr. Justice Douglas, sitting as Circuit Justice, said in *Herzog* v. *United States*, 75 S. Ct. 349, 351, 99 L. Ed. 1299, 1301:

> "A question might seem substantial to one person and not to another. My years of experience on the Supreme Court with petitions for certiorari is en-

[9] In *Cash* v. *United States*, 261 F. 2d 731, 739-740 (App. D.C.), Circuit Judge Burger argued that "frivolous" was the equivalent of the lack of a question or issue "which has some substance or some merit, some scintilla of prospect of success." An appeal raising questions "which have *no* substance has no prospect of success" and is therefore without merit and "frivolous", and "malicious" and "not taken in good faith", he added. This Court's summary reversal of the *Cash* case, 357 U.S. 219, indicates disapproval of such statements.

> lightening in this regard. The practice is to grant those petitions on a vote of four Justices. Those who vote to deny the petition, either because they think the decision below was right or that the petition presents nothing substantial, often vote to reverse after oral argument. Further study of a problem often changes a vote. Further study may do more; it may indeed change the views of the majority of a court. It has happened over and again in the Supreme Court; and I am confident it also happens in other courts."

The same, of course, could be said of "frivolous," if interpreted to mean lack of a substantial question. It is upon the appeal which petitioner seeks to take that his case is to be determined on its merits; not upon his petition for leave to appeal.

(2) The concept of frivolousness is also *not* the equivalent of the petitioner having no "realistic chance of success were the appeal to be allowed." *Cash* v. *United States*, 261 F. 2d 731, 738 (App. D.C., per Prettyman, C.J.). The summary reversal of the *Cash* case by this Court and the remand of the case to the Court of Appeals for reconsideration in light of *Ellis* amply demonstrated this Court's dissatisfaction with any such equivalence. 357 U.S. 219.

To make one's right to appeal turn upon the "realistic chance of success were the appeal to be allowed" would be to indulge in a risky legal sport. The success or failure of an appeal frequently is determinable only after the written and oral arguments of the opposing parties have been fully developed and the court has then had an opportunity to bring its informed views to bear upon such matured issues. The make-up of a particular appellate panel is sometimes decisive as to the chances of an appeal. An unanticipated concession or admission by counsel during oral

argument on occasion may be determinative. See *Williams* v. *Georgia*, 349 U.S. 375, 381-2. It is, in other words, the relatively rare case, where, at a preliminary stage of the appeal process, it can properly and safely be said with certainty that the appeal has no chance whatever of success. And so frivolousness must mean something other than the absence of a realistic chance of success, in order for Section 1915(a) to have any substance.

(3) The reference in the *Ellis* opinion to Rule 39(a) of the Federal Rules of Criminal Procedure, relating to the dismissal of prepaid appeals, provides the real clue to the meaning of the term "frivolous." In the leading case under Rule 39(a), *United States* v. *Johnson*, 327 U.S. 106, 113, this Court ruled that a prepaid appeal should be dismissed as frivolous if the question raised on appeal "does not present a reviewable issue" within the jurisdiction of the appellate court. If an issue is reviewable, in other words, the appeal cannot be dismissed as frivolous even though the issue may ultimately be found to be without substance and even though the realistic chances of success seem slim.

If there is a "reviewable issue," then its presentation establishes the fact that the appeal is being prosecuted in good faith and is not frivolous. The right to appeal—and to have "not plainly frivolous" issues fully and fairly considered on their merits—belongs alike to the rich and the poor, to the good and the bad, to the innocent and the guilty, to the deserving and the meretricious. A "not plainly frivolous" issue includes any issue which an appellate court can conscientiously consider, or can conscientiously look into further, on appeal. It includes any issue which an appellate judge may feel would warrant some further or fuller exploration.

On the other hand, if the issue is undeniably outside the jurisdiction of the court, or if the issue asks only for a

review of facts as already found by a jury on the basis of incontrovertibly sufficient evidence, or if the issue is utterly incomprehensible, then the issue may be determined to be presented in bad faith, to be clearly non-reviewable, and hence to be frivolous.

If the issue is one that might conceivably be felt by even one appellate judge to warrant further exploration, this alone should normally indicate that the issue is reviewable and hence non-frivolous. Is it at all possible that the issue, if fully briefed and developed, would be considered seriously by one or more appellate judges?[10] Cf. opinions as Circuit Justices of Mr. Justice Harlan in *Roth* v. *United States*, 77 S.Ct. 17, 1 L. Ed. 2d 34; and of Mr. Justice Frankfurter in *Sklaroff* v. *Skeadds*, 76 S.Ct. 736, 100 L. Ed. 1524. In a particular case, the absence of even a scintilla of support in law or fact or jurisdiction, the absence of the slightest likelihood of serious consideration by any appellate judge, might all combine to sustain a finding that the appeal was frivolous and in bad faith. But short of this, the merits of the appeal should not be decided at the stage of the motion for leave to appeal.

Such, it is submitted, should be the real meaning of the *Ellis* rule. And tested by that rule, the presentation of the two issues in this case cannot, by any stretch of the imagination, be considered as frivolous or in bad faith.

---

[10] "Thus grounds appearing 'frivolous' to one judge may constitute reversible error in the eyes of another. This is sometimes the case even within division of our own courts" Circuit Judge Bazelon in *Jones* v. *United States*, 266 F. 2d 924, 926, note 5 (App. D.C.). Moreover, as Judge Bazelon noted in note 4 of that opinion, 14 of 18 prepaid criminal appeals appearing in volumes 246 to 258 of Federal Reporter, Second Series, were affirmed by the Court of Appeals for the District of Columbia Circuit. Yet none of those 14 were dismissed as frivolous.

Indeed, it must be evident in the present case that the appeal should have been allowed *in forma pauperis* even if the applicable standards were to be deemed far more rigorous and hostile to indigent appellants. Even if "not plainly frivolous" were to be equated with "substantial"—which is clearly not a correct standard—and even if the measure of such substantiality were deemed to require a preliminary showing of some strong possibility of reversal on appeal—which is likewise not a correct standard—the presentation of the two issues in this case would still readily meet the test. There could be no rational definition of either "non-frivolous" or "substantial" which would disqualify this petitioner from the right to have his appeal *in forma pauperis* allowed, so that the issues raised on his behalf could be fully heard and determined on the merits.

The treatment which has been accorded to this petitioner by the Court of Appeals is a gross discrimination against him because of his indigence. All traces of such discrimination must be eliminated from the federal judicial system. Apparently this can be accomplished only by this Court's reiteration and amplification of its prior rulings.

II.

The Two Issues Raised on Behalf of Petitioner Were Non-Frivolous so as to Warrant an Appeal in Forma Pauperis.

The error of the Court of Appeals in denying petitioner leave to appeal *in forma pauperis* is further evidenced by an examination of the two issues which appointed counsel sought to raise on petitioner's behalf. Two issues were presented which, in the language of the *Ellis* case, were "not plainly frivolous" whatever might be their "particular degree of merit." Indeed, those issues were far more than

merely non-frivolous; they were, by any standard, substantial in nature. To say that these issues were so frivolous as to warrant dismissal of an appeal if brought by a non-indigent litigant is to render meaningless the right of this indigent petitioner to appeal pursuant to 28 U.S.C. §1915(a).

a. *The references to petitioner's past criminal record.*

Without attempting a full analysis or a demonstration of the ultimate merit of the issue, it is plain that the first question presented on behalf of the petitioner is of a non-frivolous nature. The substantiality of that question is at once evident from even a cursory examination of its various facets.

Axiomatic, of course, is the proposition that, where a criminal defendant does not take the stand, evidence as to his past criminal record or as to his unsavory character is inadmissible. See *Michelson* v. *United States*, 335 U.S. 469, 475; *Boyd* v. *United States*, 142 U.S. 450. Here the trial record contains repeated references by the complaining witness and others to the effect that petitioner had previously served a term at Occoquan Workhouse—a well-known jail for District of Columbia prisoners. This train of references was first induced by a question by the prosecutor. And since the petitioner did not take the stand, a serious and substantial question is thereby raised as to whether the court took proper steps to counteract the prejudicial statements. As stated by this Court in *Farley* v. *United States*, 354 U.S. 521, 522, involving a claim that the trial court had erred in permitting the United States Attorney to ask irrelevant and prejudicial questions about another criminal offense, "If the allegations made by petitioner and his counsel are correct then it seems quite clear to us that his appeal cannot be characterized as frivolous."

More precisely, this issue may be broken down into four parts:

(1) What effect should be given the fact that the prosecution was responsible for the first reference to petitioner's past criminal record? This question becomes of critical importance by virtue of the fact that the prior report of the United States Commissioner, R. 13-14, was available to the prosecutor when he asked the complaining witness where he had seen petitioner, R. 2. That report made plain that the complaining witness, if asked where he had seen petitioner, would likely reply that he had served a year in jail with the petitioner. Yet, with that report available to him, the prosecutor asked a question that could be expected to and did bring out petitioner's prior jail sentence. In those circumstances, can the prosecutor be heard to say, R. 2, that "I didn't realize that this was the case"?

Precisely this kind of situation, where the prosecutor knew or should have known of the likely answer referring to the past criminal record, was involved in *United States* v. *Tomaiolo*, 249 F. 2d 683, 695 (C.A. 2), and led to the reversal of the conviction in that case. There the prosecutor, with knowledge gleaned from prior FBI advice, elicited testimony that the co-defendant had known the defendant's brother when both the defendant and his brother had been in prison. Said the court, pp. 695-696:

> "And it is fairly apparent that the prosecutor knew that the answers to his questions would reveal Soviero's criminal past. Certainly the special agents of the FBI had already advised him, out of court, of the reason why Soviero refused to sign the statement.
>
> "Nor may Tomaiolo's testimony be classed as purely voluntary. Even if he did not have actual knowledge

of the times during which Louis Soviero was in prison, the prosecutor had the means of gaining such information. Yet he pressed the reluctant Tomaiolo to answer."

In reply (Brief in opposition, p. 6), the Solicitor General has argued that the reference to petitioner's past prison record was proper since his identity was in issue and that the petitioner "gains no momentum" from the fact that the United States Commissioner's report was available to the prosecutor. The force of that argument needs to be explored on fuller consideration of this appeal; at this juncture the argument only adds to the non-frivolousness of the issue. And it may well be, as in *United States* v. *Apuzzo*, 245 F. 2d 416, 421 (C.A. 2), that this contention of the Government as to the admissibility of such evidence need never be reached "since the prosecutor did not offer it, and the incident did not develop so far as to raise the issue."

(2) What effect should be given the fact that the reference to petitioner's past record was not an isolated one but was repeated on several occasions? Here it seems impossible to argue that the first reference was so isolated as to be inconsequential. Cf. *United States* v. *Stromberg*, 268 F. 2d 256, 269 (C.A. 2). The matter was brought out not only by the prosecutor (R. 2) but by the trial judge himself (R. 3), by the complaining witness voluntarily (R. 5) and finally by the charge to the jury (R. 6). Thus the original reference, induced by the prosecution, was reiterated and magnified.

In these circumstances, was it enough for the court merely to strike the first two references? And what effect should be given the fact that one of the references (R. 3) was contained in a question by petitioner's court appointed

counsel?"[11] Is it enough to say, as the Solicitor General has said (Brief in opposition, p. 6), that petitioner "cannot predicate error on the deliberate tactics of trial counsel". All of these questions must be examined and answered in determining whether the chain of events was such as to prejudice the jury and deprive petitioner of a fair trial. *United States* v. *Tomaiolo*, 249 F. 2d 683, 695 (C.A. 2).

(3) Were the erroneous references cured by adequate admonitions and instructions to the jury by the trial judge? This is a most serious question. The judge here did no more than cryptically strike the first two references (R. 2, 3) without attempting then and there to erase any possible prejudicial effect from the jury's mind. Such summary action has been held totally inadequate. See *United States* v. *Tomaiolo*, *supra*, 695, where the court stated:

> "The prosecutor thereupon said 'I ask the jury to disregard the last statement' whereupon the trial judge repeated the thought: 'Yes. Disregard the last statement.' We think this was inadequate and the absence of sufficient instruction constitutes error."

On one other occasion (R. 5) the court did nothing whatever when the witness volunteered that "Me and Benny done a year in Occoquon." Indeed, the judge himself repeated

---

[11] In *United States* v. *Tramaglino*, 197 F. 2d 928, 932 (C.A. 2), the defense attorney had elicited from a co-conspirator evidence that the defendant had sold some marihuana on a date outside the period named in the indictment. Said the court: "Inadmissible evidence like this might well be prejudicial and pivotal in a close case. Here there was little question but that it was inadvertent; it was elicited by a defense counsel and not by the government . . . Nonetheless it was error, even if inadvertent, and we must therefore rest our conclusion that it was not prejudicial on the ground that the other evidences of . . . guilt were so strong that it is unbelievable that a rational jury would have acquitted if this error had not occurred." Cf. *United States* v. *Giallo*, 206 F. 2d 207, 209-210 (C.A. 2).

the prejudicial fact during the trial (R. 3: "Why do you mention Occoquon?") and in his instructions to the jury (R. 6: ". . . the complaining witness, Mr. Edgeworth, testified that he and the defendant met at Occoquon."). Under these circumstances it is highly doubtful if it was sufficient for the judge to charge the jury, R. 6, that "you are to draw no inferences whatsoever as to the guilt of the defendant" from this prejudicial testimony and that such testimony "is to be considered only in as far as it affects his [the complaining witness'] credibility as a witness."

In other cases, courts have insisted on far more explicit and far-reaching instructions in order to make certain that the unfairness was fully dissipated. Thus in *United States* v. *Curzio*, 179 F. 2d 380, 381 (C.A. 3), after telling the jury at the time of the incident to brush the prejudicial statement from its mind, the judge in his charge to the jury stated: "I told you at that time to disregard that testimony completely, and I hope you did. We are trying the case on the evidence here in this courtroom and not on anything else, and there is no evidence in this case that Mr. Curzio has a police record or that he has ever been convicted of any crime before, so wipe that out of your minds completely." Such a complete instruction convinced the appellate court that the trial judge had done all that was possible to eradicate the prejudicial effects. And see *United States* v. *Stromberg*, 268 F. 2d 256, 269 (C.A. 2); *United States* v. *Apuzzo*, 245 F. 2d 416, 420, note 4 (C.A. 2); *Marsh* v. *United States*, 82 F. 2d 703, 704 (C.A. 3).

(4) Was the error so plain and substantial as to be reversible in the absence of objection by petitioner's court-appointed trial counsel? In *United States* v. *Modern Reed & Rattan Co.*, 159 F. 2d 656, 658 (C.A. 2), the court said such an error was so plain and so far-reaching that it should

be noticed even in the absence of an objection. And in *United States* v. *James*, 208 F. 2d 124, 125 (C.A. 2), this type of testimony was held to be too prejudicial "to permit the erroneous admission of it to pass as harmless error."

Such, then, are the substantial areas of inquiry to be made into the issue as to the prejudicial impact of the Occoquan testimony. From the standpoint of this issue alone, petitioner's appeal can no more be characterized as frivolous than was the appeal in *Farley* v. *United States*, 354 U.S. 521. Petitioner was thus entitled to a full hearing and resolution of this issue by the Court of Appeals.

b. *The constitutionality of Judge Jackson's assignment.*

The second non-frivolous issue presented by the record in this case is a serious and unresolved constitutional one. It grows out of three facts: (1) Judge Joseph R. Jackson, the presiding trial judge in this case, was nominated and confirmed in 1937 as a judge of the Court of Customs and Patent Appeals, entering upon his duties on December 15, 1937; (2) Judge Jackson retired from the Court of Customs and Patent Appeals as of April 1, 1952, see 193 F. 2d XV, thus covering a 14½ year period of service during all of which that court unquestionably was a legislative tribunal; (3) the said Judge Jackson was designated and assigned by the Chief Justice of the United States, pursuant to 28 U.S.C. §294(d), to serve as a district judge of the United States District Court for the District of Columbia throughout the year 1960, thereby covering the period of petitioner's trial in this case. The constitutional question thus posed is whether Article III of the Constitution permits such an assignment of a retired legislative court judge to perform the functions and powers of the District Court stemming from Article III.

Petitioner's counsel has presented this issue in the context of an effort to secure for petitioner the right to proceed with his appeal in the court below *in forma pauperis*. Under the *Ellis* case the presentation of any non-frivolous issue would entitle petitioner to exercise that right. Should this Court agree that this constitutional issue is indeed non-frivolous, the Court might deem it appropriate to remand the case so that the Court of Appeals could hear and determine the merits of this issue, together with that relating to the trial references to petitioner's past criminal record. In that way, the Court would obtain the benefit of the views of the Court of Appeals on the constitutional problem raised in this case.

However, the rather unique nature of this constitutional issue may make it desirable for this Court to resolve the issue now without awaiting further proceedings in the court below. Of necessity, the issue is not only constitutional but jurisdictional and is of the type that traditionally can be raised and resolved at any stage of a proceeding. More importantly, the issue is both novel and significant, and it may well affect the assignability of all legislative court judges to constitutional courts. And since the assignment of such judges is peculiarly the function of the Chief Justice of the United States, this Court may feel that it should resolve this important question immediately. Particularly may this course of action be appropriate in light of the fact that the court below has entered orders in at least four pending appeals from Judge Jackson's judgments, holding those appeals in abeyance pending this Court's possible resolution of the constitutional issue.[12]

---

[12] Orders to that effect have been entered by the Court of Appeals in the following pending cases: *Valentine* v. *United States*, Misc. No. 1518; *Peters* v. *United States*, No. 15,546; *Mills* v. *United States*, No. 15,998; *Guterma* v. *United States*, No. 16,106.

Therefore, without abandoning the basic position that the raising of so non-frivolous an issue entitled petitioner under the *Ellis* case to process his appeal below and to secure a determination on this issue by the Court of Appeals, petitioner's counsel submits the following considerations in support of the proposition that the Constitution precluded the assignment of Judge Jackson to preside over this trial:

(1) *Petitioner's right to be tried by a constitutional court judge.* It has not been denied by the United States that petitioner, as an inhabitant of the District of Columbia under criminal indictment, was constitutionally entitled to be tried before a judge qualified to sit on a constitutional court. Indeed, that proposition is so elementary and so compelled by prior decisions of this Court as to be unquestionable.

As stated in *O'Donoghue* v. *United States,* 289 U.S. 516, 540, the inhabitants of the District of Columbia are "entitled to all the rights, guaranties, and immunities of the Constitution, among which . . . [is] the right to have their cases arising under the Constitution heard and determined by federal courts created under, and vested with the judicial power conferred by, Art. 3." This means that, in the exercise of their "privilege of trial by jury in criminal cases," *Callan* v. *Wilson,* 127 U.S. 540, 550, the people of the District are entitled to pursue such a constitutional privilege before a constitutional or Article III court composed of a judge fully qualified to sit thereon.

The trial of a criminal felony case—whether the crime be one outlawed by the United States Code or the District of Columbia Code—invokes the judicial power of the United States as defined in Article III. And it is the prime function of Article III courts "to try cases and controversies between individuals and between individuals and the Gover-

ment," including the "trial of criminal cases." *Toth* v. *Quarles*, 350 U.S. 11, 15. In such matters, therefore, the courts of the District of Columbia must be considered Article III courts and the judges of those courts clothed with the salary and tenure provisions of Article III.[13] *O'Donoghue* v. *United States*, 289 U.S. 516, 551. And accordingly the residents of the District are entitled to insist that the judges purporting to exercise criminal jurisdiction over them be in fact judges of an Article III nature. In the words of the Court in *Evans* v. *Gore*, 253 U.S. 245, 248, 253:

> "With what purpose does the Constitution provide that the compensation of the judges 'shall not be diminished during their continuance in office'? Is it primarily to benefit the judges, or rather to promote the public weal by giving them that independence which makes for an impartial and courageous discharge of the judicial function? . . .
>
> "These considerations make it very plain, as we think, that the primary purpose of the prohibition against diminution was not to benefit the judges, but, like the clause with respect of tenure, to attract good and competent men to the bench and to promote that independence of action and judgment which is essential to the maintenance of the guaranties, limitations and pervading principles of the Constitution and to the administration of justice without respect to persons and with equal concern for the poor and the rich.

[13] Article III, Section 1, of the Constitution reads: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

> Such being its purpose, it is to be construed, not as a private grant, but as a limitation imposed in the public interest; in other words, not restrictively, but in accord with its spirit and the principle on which it proceeds."

Accordingly, petitioner has the right and the standing to demand that this public interest be vindicated and that his trial be conducted before a judge properly invested with the powers and protections of Article III. Only in that way can he be assured of a trial before a judge who possesses "that independence of action and judgment which is essential to the maintenance of the guaranties, limitations and pervading principles of the Constitution and to the administration of justice without respect to persons and with equal concern for the poor and the rich." *Ibid.*, 253.

Petitioner, in short, is entitled to question the propriety of the composition of the court before whom his liberty was at stake. See *United States* v. *American Foreign SS. Corp.*, 363 U.S. 685; *Ayrshire Collieries Corp.* v. *United States*, 331 U.S. 132. More specifically, he can challenge the validity of the assignment of the judge charged with the duty of presiding at the trial, particularly since this challenge is made on a direct appeal from the conviction rather than in a collateral proceeding. See *Donegan* v. *Dyson*, 269 U.S. 49, 54-55.

(2) *The necessity of reaching the constitutional issue.* Petitioner's challenge to the assignment of Judge Jackson must be [redacted] constitutional terms. There can be no doubt as to the *statutory* authority for the assignment. The Court of Customs and Patent Appeals is generally known as "a United States court" and its judges are denominated as "judges of the United States" for purposes of the judicial retirement law, 28 U.S.C. §371(b). Such a designation, how-

ever, is quite consistent with the court being a legislative court and the judges thereof being legislative court judges. See *Ex parte Bakelite Corp.*, 279 U.S. 438, 460.

So too, the assignment statute plainly contemplates the assignment of a retired judge of the Court of Customs and Patent Appeals to the District Court.[14] Under 28 U.S.C. §294(d), as amended in 1958, the Chief Justice is authorized to designate and assign any "retired judge of the United States" on the specified roster to any court of appeals or district court in the country. As explained in S. Rep. No. 2309, 85th Cong., 2d Sess. (1958), 2 U.S. Code Cong. and Adm. News (1958), p. 3912, the 1958 amendment of §294 was designed *inter alia* to authorize the Chief Justice to assign "any retired judge of the . . . Court of Customs and Patent Appeals . . . to perform such judicial duties in any judicial circuit as he is willing to undertake."

Thus the only question unresolved is whether Congress has the constitutional power to grant such authorization. That issue is inescapably presented by the assignment in this case, an assignment that in all respects complied with the statutory requirements. An examination of the constitutional considerations is therefore in order.

(3) *The constitutional nature of the District Court for the District of Columbia.* The decision in *O'Donoghue* v. *United States*, 289 U.S. 516, makes plain that the United States District Court for the District of Columbia is a constitutional court of the United States, ordained and established under Article III of the Constitution, that the

[14] The assignment statute, 28 U.S.C. §294(d), conceivably could be interpreted so as to authorize the assignment only of judges of the Court of Customs and Patent Appeals who sat thereon or who retired after the statutory amendments of 1958. Thus the constitutional issue in this instance could be avoided. But a fair reading of the statutory language and particularly of its legislative history makes such a limited scope unlikely of delineation.

judges of that court hold their offices during good behavior, and that their compensation cannot, under the Constitution, be diminished during their continuance in office.

In addition, certain administrative or non-judicial functions may constitutionally be given to the District Court since, in dealing with the District of Columbia, "Congress possesses the powers which belong to it in respect of territory within a state, and also the powers of a state." *Ibid.*, 545. See also *Keller* v. *Potomac Electric Co.*, 261 U.S. 428, 442-443; *Butterworth* v. *Hoe*, 112 U.S. 50, 60; *United States* v. *Duell*, 172 U.S. 576; *Baldwin Co.* v. *Howard Co.*, 256 U.S. 35. Such powers stem from the express authority given Congress by the Constitution, Article I, Section 8, Clause 17, to legislate for the District of Columbia. The result of recognizing that the courts of the District may validly exercise both judicial and non-judicial functions has been to classify them as hybrid courts. See 1 Moore, Federal Practice, §0.4[4], p. 72 (2d ed., 1960).

But this hybrid nature does not negate the fact that the District Court for the District of Columbia is basically and primarily a constitutional court, the judges of which are nominated, confirmed and vested with authority for the primary purpose of exercising the judicial power of the United States under Article III of the Constitution. And in the administration of criminal justice, whether under the United States Code or the District of Columbia Code, that court is most certainly exercising a judicial rather than a non-judicial function, see *Toth* v. *Quarles*, 350 U.S. 11, 15. It is a function that can in no way be vested in or exercised by a legislative or administrative officer. Only a judge clothed with Article III power can so act. A judge of the District Court, as the *O'Donoghue* case teaches, does have that power. That is the power, of course, which was

invoked by the criminal proceeding against the petitioner in this case.

(4). *The legislative nature of the Court of Customs and Patent Appeals.* Judge Jackson was nominated and confirmed as a judge of the Court of Customs and Patent Appeals in 1937 and entered upon his duties on that court on December 15, 1937. He retired therefrom as of April 1, 1952.[15] During that period of time there can be no question but that the said court was "a legislative and not a constitutional court." *Ex parte Bakelite Corp.*, 279 U.S. 438, 459. It was a court created by Congress in 1909,[16] as the *Bakelite* opinion, pp. 458-9, pointed out,

> "... in virtue of its power to lay and collect duties on imports and to adopt any appropriate means of carrying that power into execution. The full province of the court under the act creating it is that of determining matters arising between the government and others in the executive administration and application of the customs laws. These matters are brought before it by appeals from decisions of the customs court, formerly called the board of general appraisers. The appeals include nothing which inherently or necessarily requires judicial determination, but only matters the determination of which may be, and at times has been, committed

[15] See 193 F. 2d XV. Judge Jackson is listed in 92 F. 2d XI as having been "appointed" to the Court of Customs and Patent Appeals on December 14, 1937. According to the records of that court, he took the oath of office and entered upon his duties on December 15, 1937.

[16] Tariff Act of 1909, 36 Stat. 105. That statute provided that "a United States Court of Customs Appeals is hereby created, and said court shall consist of a presiding judge and four associate judges appointed by the President, by and with the advice of the Senate, each of whom shall receive a salary of ten thousand dollars per annum. It shall be a court of record, with such jurisdiction as hereinafter established and created."

exclusively to executive officers. True, the provisions of the customs laws requiring duties to be paid and turned into the treasury promptly, without awaiting disposal of protests against rulings of appraisers and collectors, operate in many instances to convert the protests into applications to refund part or all of the money paid; but this does not make the matters involved in the protests any the less susceptible of determination by executive officers. In fact their determination has been at times confided to the Secretary of the Treasury, with no recourse to judicial proceedings.

"This summary of the court's province as a special tribunal, of the matters subjected to its revisory authority, and of its relation to the executive administration of the customs laws, shows very plainly that it is a legislative and not a constitutional court."

The essence of the *Bakelite* decision and its categorization of the Court of Customs and Patent Appeals as a legislative court is the emphasis put upon the fact that the court's functions could be, and at earlier times had been, performed by executive officers of the Government. The judicial hue permeating some of the court's proceedings cannot hide the essentially administrative or legislative nature of those proceedings. The court is simply carrying out some of the functions of government authorized by Article I of the Constitution, functions which at one point were performed solely within the Treasury Department. Thus the Court was compelled in the *Bakelite* case to conclude that this legislative court was not created to execute, and does not in fact execute, the judicial power of the United States specified in Article III. And in *Williams* v. *United States*, 289 U.S. 553, 571, a unanimous Court took pains to state that "Further reflection tends only to confirm the views expressed in the Bakelite Corp. opinion as

to the status of the Court of Customs Appeals, and we feel bound to reaffirm and apply them." [17]

The dichotomy between legislative and constitutional courts which flowered in the *Bakelite* and *Williams* cases with specific reference to the Court of Customs and Patent Appeals had its genesis in the opinion of Chief Justice Marshall in *American Ins. Co.* v. *Canter*, 1 Pet. 511, 546, rendered in 1828. There the status and jurisdiction of courts created by Congress for the then Territory of Florida were drawn into question. And there the Chief Justice concluded that such courts, being composed of judges holding office for only four years,

> ". . . are not constitutional Courts, in which the judicial power conferred by the constitution on the general government, can be deposited. *They are incapable of receiving it.* They are legislative Courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States. The jurisdiction with which they are invested, is not a part of that judicial power which is defined in the 3d article of the constitution, but is conferred by Congress, in the execution of those general powers which that body possesses over the territories of the United States." [Emphasis added.]

---

[17] In the *Williams* case, the then Solicitor General took the position that the Court of Claims, like the Court of Customs and Patent Appeals, was not an Article III court—a position which the Court sustained. But in 1944 in *Pope* v. *United States*, 323 U.S. 1, after a restudy of the question, Solicitor General Fahy's brief argued that the *Williams* case was wrong. The Court in the *Pope* case, 323 U.S. at 13, however, found it unnecessary "to consider what effect the imposition of non-judicial duties on the Court of Claims may have affecting its constitutional status as a court and the permanency of tenure of its judges."

Thus it can be said that the Court of Customs and Patents Appeals, being solely legislative in its origins and functions, is "incapable of receiving" the judicial power designated in Article III of the Constitution. And since a judge can receive no more and no less authority than the court to which he is appointed, a judge of the Court of Customs and Patent Appeals must be deemed "incapable of receiving" Article III judicial power. In effect, he is authorized to perform only the functions which the Court in the *Bakelite* case found were earlier performable by executive department officials. At no time was he ever nominated, confirmed or authorized to perform any Article III functions —functions that he is "incapable of receiving."

Leaving aside for the moment the effect of the 1958 legislation labeling the Court of Customs and Patent Appeals a constitutional court, Congress has consistently treated this court as a legislative court. Not until 1930, following the *Bakelite* decision, did Congress seek to provide the judges of this court with tenure "during good behavior." Act of June 17, 1930, 46 Stat. 762, 28 U.S.C. §301a (1940 ed.). It then sought to make such tenure retroactive, indicating that prior to the 1930 statute the judges held office only at the will of the President or Congress. To be sure, a legislative court judge may hold office "for such term as Congress prescribes, whether it be a fixed term of years or during good behavior" without affecting his legislative status. *Ex parte Bakelite Corp.*, 279 U.S. 438, 449. But the freedom with which Congress has dealt with the tenure of these judges—in contrast to the constitutional requirement of good behavior tenure for Article III court judges —emphasizes the legislative control which is the hallmark of legislative judges.

Moreover, when Congress enacted the Legislative Appropriation Act of June 30, 1932, 47 Stat. 382, 402, reducing

the salaries of all judges other than Article III judges to $10,000 per annum, the judges of the Court of Customs and Patent Appeals were quick to comply.[18] And this Court in *Williams* v. *United States*, 289 U.S. 553, held that Congress could make such a reduction as to judges of the Court of Claims because they, like judges of the Court of Customs and Patent Appeals, were merely legislative court judges. In contrast, the companion decision in *O'Donoghue* v. *United States*, 289 U.S. 516, held that such a legislative reduction in salary could not be made as to judges of the District of Columbia courts because of their constitutional status. Hence this 1932 action of Congress in cutting the salaries of judges of the Court of Customs and Patent Appeals is a dramatic illustration of the legislative control over those judges retained by Congress. Had such judges had any semblance of Article III power, the Constitution would have forbidden this salary reduction.

Finally, it should be noted that the fact that this Court has acknowledged jurisdiction to review customs cases—in contrast to patent and trademark matters—arising in the Court of Customs and Patent Appeals[19] in no way detracts from the legislative nature of that court. The *Bakelite* decision, 279 U.S. at 451, recognized that legislative tribunals may determine certain matters susceptible of judicial resolution. And in *Pope* v. *United States*, 323 U.S. 1, the Court expressly held that the judicial determinations of a legislative court may be subjected to appellate review by this Court even though the non-judicial functions of such

[18] Counsel is advised that the judges of the Court of Customs and Patent Appeals voluntarily accepted the reduction in salary from $12,500 to $10,000 and waived any constitutional claims they might otherwise have made—futile though such claims might have been by virtue of the *Williams* decision.

[19] See *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294; *Barr* v. *United States*, 324 U.S. 83.

a court are not so subject. But the judicial determinations thus reviewable on appeal do not reflect the possession of any Article III power by the legislative court. In the words of Chief Justice Vinson in his opinion in *National Ins. Co.* v. *Tidewater Co.*, 337 U.S. 582, 641:

> "The legislative courts created by Congress also can and do decide questions arising under the Constitution and laws of the United States (and, in the case of territorial courts, other types of jurisdiction enumerated in Article III, §2 as well), but that jurisdiction is not, and cannot be, 'a part of that judicial power which is defined in the 3d article of the Constitution.' These courts are 'incapable of receiving it.' *American Insurance Co.* v. *Canter*, 1 Pet. 511 at 546; *Reynolds* v. *United States*, 98 U.S. 145 at 154."

(5) *The impact of the 1958 designation of the Court of Customs and Patent Appeals as a constitutional court.* At least until August 25, 1958, there is not the slightest indication that the Court of Customs and Patent Appeals was anything other than a legislative court. Neither the court nor its judges were thought to possess Article III judicial power, and it is clearly evident that Judge Jackson was nominated, confirmed and served as a judge of a purely legislative court during his term ending in 1952. And nothing set forth in the Solicitor General's brief in this case in opposition to the petition for certiorari appears to the contrary.

What the Solicitor General did say in that brief is that the Act of Congress, effective August 25, 1958, 72 Stat. 848, constituted a declaration of Congressional intent "that the Court of Customs and Patent Appeals should be a constitutional court," thereby affecting "the status of all the judges of that court, both active and retired." (Brief, p. 7.) Just

as the legislation *ipso facto* made the judges on that court in 1958 judges of an Article III court, said the Solicitor General (Brief, p. 8), "so it made Judge Jackson a retired judge of an Article III court" and hence "in no way disabled from presiding in the district court."

Inquiry into the meaning and effect of this 1958 legislative declaration thus becomes necessary.[20] This declaration took the form of an amendment to 28 U.S.C. §211, adding a second sentence, so that it now reads:

> "The President shall appoint, by and with the advice and consent of the Senate, a chief judge and four associate judges who shall constitute a court of record known as the United States Court of Customs and Patent Appeals. Such court is hereby declared to be a court established under article III of the Constitution of the United States."

As stated in the authoritative legislative report, S. Rep. No. 2309, 85th Cong., 2d Sess. (1958), 2 U.S. Code Cong. and Adm. News (1958), pp. 3909-3910, the primary purpose of this amendment was

> ". . . to settle the status of the Court of Customs and Patent Appeals by declaring it to be a constitu-

[20] The brief in opposition to the petition for certiorari in this case (p. 7) misconstrued petitioner's position with respect to the 1958 legislation. Petitioner never conceded that this legislation was constitutionally effective in establishing the Court of Customs and Patent Appeals as a constitutional court. Nor did he concede that the judges sitting on that court at the time of the 1958 amendment became judges of an Article III court. In emphasizing that the problem in this case is whether the assignment statute can validly be applied to an assignment of a retired judge of a court that during his tenure thereon was never more than a legislative court (Petition, p. 15), petitioner was merely underscoring the issue in terms of the facts of this case. To determine the issue as thus confined, it may well be necessary to determine the full impact of the 1958 legislation on the court itself, the judges sitting in 1958 and retired judges such as Judge Jackson.

tional court. The court is now constituted under section 211 of title 28, United States Code, and is classified as a legislative court. Section 1 of the bill would amend section 211 so as specifically to declare the court 'to be a court established under article III of the Constitution of the United States.'

"The cases over which the Court of Customs and Patent Appeals has jurisdiction come within the judicial power of the United States as set forth in article III, which provides that such judicial power shall extend to controversies to which the United States shall be a party. Prior to the creation of the court by the Tariff Act of 1909 the jurisdiction which it now exercises to review decisions of the Customs Court (until 1926 called the Board of General Appraisers) was exercised by the former circuit courts of the United States under section 15 of the Customs Administrative Act of June 10, 1890 (ch. 407, 26 Stat. 138). The old circuit courts were, of course, constitutional courts. And prior to April 1, 1929, the jurisdiction which the court now exercises to review decisions of the Patent Office was exercised by the Court of Appeals for the District of Columbia, a constitutional court. See the act of March 2, 1929 (ch. 488, 45 Stat. 1476). Thus there can be no doubt that the Court of Customs and Patent Appeals should be a constitutional court.

"Similar legislation was enacted by the 83rd Congress establishing the Court of Claims as a constitutional court (act of July 28, 1953, ch. 253, 67 Stat. 226) and by the 84th Congress establishing the Customs Court as a constitutional court (act of July 14, 1956, ch. 589, 70 Stat. 532). There has never been any revisory power in the executive or legislative branches of the Government over the decisions of the Court of Customs and Patent Appeals. On the contrary its deci-

sions are final, subject only to review by the Supreme Court of the United States. The bill will remove all doubt as to the status and source of authority of the court by making it explicitly clear that it is established under and derives its judicial power from article III of the Constitution.

The bill to designate the Court of Customs and Patent Appeals as a constitutional court and to make various other amendments involving the assignment of judges was known as H.R. 7866, 85th Cong. When this bill reached the floor of the House of Representatives for discussion,[21] Representative Celler and Representative Keating both made it plain that the bill "makes no change in the structure, organization or jurisdiction of the court." 104 Cong. Rec. 16095 (Aug. 4, 1958). Representative Keating added, however, that:

> "The Court of Customs and Patent Appeals hears appeals in patent, customs and tariff cases raising questions under the Constitution, the laws of the United States, and treaties made under their authority. Its jurisdiction also extends to controversies to which the United States is a party. This subject matter has always been of the type to which jurisdiction extends by virtue of the Constitution. Under these circumstances, the court itself should be established as a constitutional court under article III."

In sum, the 1958 legislation was the last in a series of three Congressional steps taken to overrule this Court's decisions in the *Bakelite* and *Williams* cases. In 1953 the Court of Claims was declared to be a constitutional court,

[21] The Senate discussion of the bill was unilluminating with respect to the problem here under inquiry. 104 Cong. Rec. 17548-17549 (Aug. 14, 1958).

67 Stat. 226, 28 U.S.C. §171, contrary to the conclusion reached in the *Williams* case, 289 U.S. at 581, that the Court of Claims "receives no authority and its judges no rights from the judicial article of the Constitution." In 1956 the Court of Customs was declared to be a constitutional court, 70 Stat. 532, 28 U.S.C. §251, contrary to this Court's description of its functions in the *Bakelite* case, 279 U.S. at 457-8, as "all susceptible of performance by executive officers." And the 1958 legislation with reference to the Court of Customs and Patent Appeals was in direct collision with the *Bakelite* determination, 279 U.S. at 458-9, that this court's background and functions "shows very plainly that it is a legislative and not a constitutional court." Essentially the same reasons were advanced by Congress in each of these three instances for declaring the respective courts to be spawned under Article III. In each instance the primary reason was that the given court in fact exercises jurisdiction over matters arising under the Constitution and laws of the United States, and within the judicial power of the United States, and hence should be classified as constitutional.[22]

Of direct pertinence to the instant case is the fact that Congress, in the process of declaring the Court of Claims a constitutional court in 1953, also sought to remove any doubt as to the power of Congress to authorize the Chief Justice of the United States to assign district and circuit judges to sit on the Court of Claims. By labeling the tribunal a constitutional court and then expressly providing for such assignments, said the authoritative House

[22] See H. Rep. No. 695, 83rd Cong., 1st Sess. (1953), 2 U.S. Code Cong. and Adm. News (1953), p. 2006, as to the Court of Claims; H. Rep. No. 2348, 84th Cong., 2d Sess. (1956), 2 U.S. Code Cong. and Adm. News (1956), p. 3122, as to the Court of Customs.

Report,[23] Congress would thereby remove all of the "considerable doubt expressed as to the authority of Congress to provide for the assignment of a judge of a constitutional court to sit on the Court of Claims in view of the ruling that it was a legislative and not a constitutional court."[24] Such considerable doubt presumably sprang from the observation of this Court in the *Bakelite* case, 279 U.S. at 460, that there might "be constitutional obstacles to assigning judges of constitutional courts to legislative courts."

And by providing subsequently for the interassignment of judges between the district and circuit courts on the one hand and the Court of Customs and the Court of Customs and Patent Appeals on the other, see 28 U.S.C. §§291, 292, 293, following the designation of the latter two courts as constitutional tribunals, Congress seemingly sought to erase any doubts as to the constitutionality of such assignments.[25]

Thus the ultimate constitutional issue as to the assignment of Judge Jackson to the District Court below, as well as the thrust of the 1958 legislation on that issue, becomes clear. This Court, as a matter of constitutional analysis, has established that there are very real distinctions between legislative and constitutional courts. As

---

[23] H. Rep. No. 695, 83rd Cong., 1st Sess. (1953), 2 U.S. Code Cong. and Adm. News (1953), p. 2009.

[24] "Doubt as to the constitutionality of assigning judges from constitutional to legislative courts and vice versa was a reason Congress assigned for classifying the Court of Claims and Customs Court as constitutional courts." 1 Moore, Federal Practice, §0.4[1], p. 60, note 34 (2d ed., 1960).

[25] In *Irish* v. *United States*, 225 F. 2d 3 (C.A. 9), a judge from the then territorial district court of Hawaii, a legislative court, was assigned to sit on the Court of Appeals for the Ninth Circuit, a constitutional court. This assigned judge wrote the opinion for the Court of Appeals. Doubt has been expressed as to the wisdom of such an assignment. See Note, 69 Harv. L. Rev. 760 (1956).

Far back as 1828, when Chief Justice Marshall delivered the *American Insurance Co.* opinion, 1 Pet. 511, those distinctions have been recognized as creating a wall between such courts to the point where legislative courts and their judges are "incapable of receiving" any of the judicial power of the United States flowing from Article III of the Constitution. Hence it has been assumed, as the *Bakelite* opinion implied (279 U.S. at 460), that this incapacity constitutionally foreclosed the assignment of legislative court judges to sit on constitutional courts so as to exercise Article III judicial power. Certainly Congress so assumed, and acted on that assumption, in its triadic effort to authorize such assignments.

The 1958 declaration by Congress as to the constitutional status of the Court of Customs and Patent Appeals thus represents a critical step in any attempt to legitimatize the assignment at issue in this case. Is such a declaration constitutionally effective? And to the extent that it is effective, can it be applied retroactively so as to invest an already retired legislative court judge with Article III powers? Those are the ultimate questions to be answered in this case. And the substantiality and difficulty implicit in those questions are clearly reflected in the action of the Judicial Conference of the United States qualifying its approval of the 1958 legislation by expressing "no view on the question whether the declaration that the United States Court of Customs and Patent Appeals was a court established under Article III of the Constitution of the United States would be constitutionally effective." [26]

[26] See S. Rep. No. 2309, 85th Cong., 2d Sess. (1958), 2 U.S. Code Cong. and Adm. News (1958), p. 3916. The Committee on Revision of the Laws of the Judicial Conference further stated "that it regarded that as a judicial question for determination by the Federal courts if it arose and not within the competence of the Judicial Conference or its committees."

(6) *The constitutional incapacity of Congress to alter the status of a legislative court by a mere declaration of the court's constitutional status.* At the base of the constitutional distinction between legislative and constitutional courts is a very simple factor: under what article of the Constitution was Congress acting when it created the particular court and endowed it with specified jurisdiction? If Congress was acting in the execution of one of its various Article I powers, the court is legislative in nature. But if Congress was acting in order to execute the judicial power of the United States under Article III, the court is a constitutional tribunal.

That is precisely the demarcation made by this Court in *Ex parte Bakelite Corp.*, 279 U.S. 438, 459, when it pointed out that it is a mistake to assume that "whether a court is of one class or the other depends on the intention of Congress," since "the true test lies in the power under which the court was created and in the jurisdiction conferred." Moreover, and in words of highest relevance to this case, the Court further noted that any constitutional obstacles to assigning judges from one type of court to another cannot be avoided "on the theory that Congress intended the court to be in one class when under the Constitution it belongs in another." 279 U.S. at 460.

To put the matter simply, a court assumes a certain status at the time of its legislative birth. In the absence of any change in the nature, functions or jurisdiction of the court, that status can no more be changed merely by a subsequent legislative declaration than can the stripes of a tiger be erased by a joint resolution of Congress. Or, to use another humble example, a man born in France can never in fact be born in Germany by virtue of a legislative fiat. Only if there is some change in the nature or jurisdiction of the court, or some effective form of sub-

stantive reorganization of the court, can a court be transposed from a legislative to a constitutional status, or vice versa.

Here the original status of the Court of Customs and Patent Appeals has been authoritatively determined by this Court in the *Bakelite* and *Williams* cases. It was a court established solely under the Article I powers of Congress and its functions and jurisdiction were solely those of a legislative court. But in seeking to change that designation in 1958, Congress made it quite clear that it was making "no change in the structure, organization, or jurisdiction of the court." 104 Cong. Rec. 16095 (Aug. 4, 1958). Congress thus eschewed any intention of giving that court any new powers which might be fairly construed as Article III powers. Thus the 1958 change was merely a semantic one, a change of nomenclature. Needless to say, constitutional distinctions of this far-reaching importance must rest on something more substantial than a word change.

The shallowness of such a change was recognized by the Deputy Attorney General of the United States in 1955 in commenting on the proposal to label the Customs Court a constitutional court.[27] The position taken by that bill, he said, "seems to be that the distinction between a legislative and a constitutional court is a matter of language." He then proceeded to call the attention of the Chairman of the House Committee on the Judiciary to this Court's opinion in the *Bakelite* case where the Customs Court had been found to perform only executive functions; and he quoted without comment the portion of that opinion explaining that the

[27] Letter from William P. Rogers, Deputy Attorney General, to Representative Celler, Chairman of the House Committee on the Judiciary, dated July 29, 1955, attached to H. Rep. No. 2348, 84th Cong., 2d Sess. (1956), 2 U.S. Code Cong. and Adm. News (1956), p. 3124.

status of a court depends not on the intention of Congress but on the power under which the court was created.

The statement of Congress in 1958 that the Customs and Patent Appeals Court was thenceforth to be known as a constitutional court thus comes to no more than an expression of Congressional opinion completely divorced from any change in the nature or functions of that court. It is precisely the kind of expression which the *Bakelite* case held to be wholly irrelevant. And the rationale given for making such a declaration, to the effect that the cases coming before that court do indeed fall within the judicial power of the United States as set forth in Article III, is nothing more than an attempt to second-guess this Court's definitive resolution of that matter in the *Bakelite* and *Williams* cases.[28] Prolonged discussion is unnecessary to demonstrate that this Court, not Congress, is the final authority in determining the applicability of the various articles of the Constitution to courts created by Congress. Cf. *Pennekamp* v. *Florida*, 328 U.S. 331, 335.

The conclusion is inescapable that the 1958 declaration of Congress, absent any change in the structure, organization or jurisdiction of the court, was totally ineffective to transform the Court of Customs and Patent Appeals into a constitutional or Article III tribunal. And the judges of

---

[28] In reporting the bill to fasten the constitutional court label on the Court of Claims, the House Committee on the Judiciary stated *inter alia*: "It seems certain that Congress, when it established the Court of Claims in 1854, intended to create a court under article III. (See Congressional Globe, 33d Cong., 2d sess., pp. 71, 72, 105-106, 110, 111, 113, and 114.) . . ." H. Rep. No. 695, 83rd Cong., 1st Sess. (1953), 2 U.S. Code Cong. and Adm. News (1953), p. 2007. Such a statement, made 99 years after the establishment of the court, cannot serve to change the legislative purpose or power in establishing the court, as determined in the *Williams* case. See *United States* v. *United Mine Workers*, 330 U.S. 258, 282.

that court—both the retired and the active judges—were no more capable of receiving or exercising Article III judicial power after that declaration than before it. Hence there is lacking any constitutional sanction for applying the assignment statute, 28 U.S.C. §294(d), so as to permit the assignment of a legislative court judge, especially a retired one, to an Article III court in order to exercise the judicial power of the United States in a criminal proceeding.

This conclusion is in no way altered by the fact that the *O'Donoghue* decision determined that the courts of the District of Columbia are of a hybrid nature, exercising both legislative and Article III powers. A legislative court judge, incapable of receiving or exercising Article III judicial power, is no more capable of exercising such power in a hybrid court to which he may be assigned than he is in a court organized exclusively under Article III. He is just as unable to execute the judicial power of the United States in a court of the District of Columbia as is a member of the National Labor Relations Board were Congress suddenly to denominate the Board an Article III court.

And the foregoing conclusion is even more obvious in the case of a legislative court judge who has retired, particularly one who was appointed to a legislative court and who retired therefrom years before Congress sought to change the court's label. While a retired constitutional court judge is considered as continuing in office within the meaning of Article III, Section 1, of the Constitution so as to forbid any diminution of his retirement compensation, *Booth* v. *United States*, 291 U.S. 339, there is no authority for adding Article III judicial functions to the powers of a judge who has previously retired from a strictly legislative court. The extent of his powers and functions must

be determined from the powers and the functions of the court to which he was originally appointed and as of the time of that appointment—at least where the powers and functions of the court remain unchanged during his tenure thereon.

Here Judge Jackson was never nominated by the President or confirmed by the Senate with the idea of his exercising Article III judicial powers; nor did he retire possessing any powers other than those of a legislative court judge. He was nominated and confirmed in 1937 on the theory that he was qualified to exercise only legislative court powers. In light of the *Bakelite* opinion then in full effect, no basis is apparent for assuming that the President or the Senate ever thought that he could or would execute any Article III judicial power by virtue of that appointment. To consider him as now possessed of new, Article III powers necessarily assumes that the Court of Customs and Patent Appeals has been reconstituted and its powers and duties altered. And if that assumption be true, renomination and reconfirmation of that court's judges would be necessary before any of them could exercise their new Article III powers. But, as already noted, no such structural change has occurred as to the Court of Customs and Patent Appeals. Hence a judge who retired from that court prior to 1958 took with him into retirement only those powers which he derived from the court during his tenure. To attempt to give him Article III powers retroactively, without even trying to alter the nature of the court upon which he sat, is a meaningless gesture.

As indicated, the effective transposition of a court from a legislative to an Article III status would require not only a change in its duties but the renomination and reconfirmation of all the judges then sitting, or the appointment

of new judges.[29] Just how a retired legislative court judge could be renominated and reconfirmed as a retired Article III court judge is not clear. But the need for some form of reappointment is obvious. The considerations which give rise to the nomination and confirmation of a man to perform the essentially executive functions of a legislative court are not necessarily the same as those involved where the appointee must be equipped to wield the Article III judicial powers. A man may be thought qualified to resolve difficult tariff or customs problems but not of the right background, training or temperament to deal with the problems of life, liberty and property in an Article III court. And if all active and retired legislative court judges are suddenly to be qualified to dispense Article III justice the President and the Senate should have some opportunity to re-evaluate such court personnel in that light. Otherwise the appointive powers of the President and the confirmation duties of the Senate are abdicated to the Chief Justice of the United States in the exercise of his assignment powers.

Finally, any conclusion that the Court of Customs and Patent Appeals is, by virtue of the 1958 amendment, a constitutional court and that its active and retired judges may be assigned to sit on Article III courts is to open a

[29] The need for reappointing judges of a legislative court if and when the fundamental character of such a court is changed was recognized in the following colloquy on the floor of the Senate during the consideration of the bill to declare the Court of Claims a constitutional court (no change being made in the structure or functions of that court), 99 Cong. Rec. 8944, July 10, 1953:

> Mr. Gore: I think it resolves itself into a question of whether we do or do not reconstitute the court. If we change the fundamental character of the court, then reappointment or appointment, as the case might be, would become absolutely necessary, and the appointments would require confirmation.
>
> Mr. McCarran: Again the Senator and I are in agreement on that, as a moot question, because we have agreed on the House bill.
>
> Mr. Gore: We shall get together on that later.

Pandora's box of confusion and inconsistencies. It still remains true, for example, that this Court will not and cannot review any lower court determination other than that of a judicial nature. And the Court of Claims—despite its denomination by Congress as an Article III court—still retains statutory jurisdiction to render advisory opinions on bills for monetary relief of claimants referred by either house of Congress. 28 U.S.C. §§1492, 2509. At the same time, however, the constitutional concepts of "cases" and "controversies", over which the federal judicial power extends, have been held to deny Article III courts the power to give advisory opinions. See, e.g., *Muskrat v. United States*, 219 U.S. 346.

How, then, can the new "constitutional" or Article III status of the Court of Claims be squared with its continuing power to render advisory opinions to Congress? Is not the 1953 declaration as to the Court of Claims inoperable on this basis alone? Or are the concepts of "cases" and "controversies" to be scrapped and recognition given to the fact that Article III courts can be delegated to perform non-judicial functions?[30]

The problem and perhaps the simple answer are to be found in the discussion of Senator Gore during the debate on the 1953 declaration as to the Court of Claims (99 Cong. Rec. 8943-8944, July 10, 1953):

> "I refer to the basic question of whether Congress can, under the Constitution, designate the Court of Claims an article III court and still require it to exercise the special type of jurisdiction which it has conferred upon it.
>
> "Over the years the Supreme Court has consistently followed the principle that the Federal courts, other

[30] See Note, The Constitutional Status of the Court of Claims, 68 Harv. L. Rev. 527, 531-535 (1955).

than those for the District of Columbia, created under article III of the Constitution, can exercise only jurisdiction falling within the judicial limits set forth in article III. . . . Thus a cloud is cast upon the constitutionality of having the Court of Claims, as an article III court, exercise the principal jurisdiction which Congress has conferred upon it. . . .

"Section 2509 of title 28 of the United States Code directs the Court of Claims to render advisory opinions on cases referred to the court by the Congress. This would seem to be a function which Congress could not require of a constitutional court. No one would seriously contend that it is a judicial power in the sense of article III.

"Since the present judges of the Court of Claims have indicated that they would raise no objection to continuing to act on congressional reference cases, perhaps the problem is moot, at least temporarily. If in the future judges of the Court of Claims should refuse to act upon congressional reference cases on the grounds that they are not within the proper scope of jurisdiction of a constitutional court, *I suppose the simple remedy will be for Congress to redesignate the Court of Claims as a legislative court.*" [Emphasis added.]

The "simple remedy" thus provided by Senator Gore is most revealing as a statement of the belief that Congress can turn the Article III status of such a court as the Court of Claims on and off like a faucet. And it epitomizes the constant threat that hangs over such a court, the threat that some day Congress may change its intention and relabel it a legislative court, with all the salary and tenure implications that such a relabeling would entail. Such is the ephemeral quality of the Congressional relabeling process.

Still another problem raised by any recognition of the effectiveness of a legislative declaration of an Article III status is one directly involving the Court of Customs and Patent Appeals. Ever since the decision in *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U.S. 693, this Court has recognized that the decisions of that court in patent and trademark application matters are not reviewable judicial judgments but merely instructions "by a court which is made part of the machinery of the Patent Office for administrative purposes."[31] See also *Pacific Northwest Canning Co.* v. *Skookum Packers' Assn.*, 283 U.S. 858; *McBride* v. *Teeple*, 311 U.S. 649.

But if the Court of Customs and Patent Appeals actually did acquire Article III status in 1958, its jurisdiction to consider such patent and trademark matters and to render administrative judgments thereon would be in constitutional jeopardy. Yet that court continues to resolve such non-judicial matters. And the United States, consistent with its position in the pre-1958 legislative court days, continues to oppose the grant of certiorari to review such post-1958 decisions on the ground that they are still non-judicial decisions outside the appellate jurisdiction of this Court. See briefs in opposition to certiorari in *Rubenfield* v. *Watson*, 362 U.S. 903; *Commissariat à L'Energie Atomique* v. *Watson*, 362 U.S. 977. And this Court has denied certiorari in those post-1958 cases, though without specifying the reasons.

Perhaps the "simple remedy" here is the one previously given by Senator Gore as to the Court of Claims—if Con-

[31] While the *Postum* case involved such an administrative determination by the Court of Appeals for the District of Columbia, that court's jurisdiction over such matters was transferred in 1929 to the Court of Customs and Patent Appeals, 45 Stat. 1475, and the decision in *Postum* is fully applicable to the decisions of the latter court.

gress really wants the Court of Customs and Patent Appeals to continue dealing with patent and trademark cases it should relabel the court a legislative tribunal. Here, then, is the threat that must constantly hang over the judges of the Court of Customs and Patent Appeals, the threat of another relabeling statute and the possibility that Congress may once again act—as it did in 1932—to cut their salaries, or to change their tenure.

These problems, if they be such, are merely indicative of the inescapable fact that the courts which were found to be legislative in nature in the *Bakelite* and *Williams* cases continue to function and operate in the same non-Article III manner as was described in those opinions. Their legislative nature continues to the present day within their original jurisdictional bounds. Nothing has changed. Like the stripes on the tiger, the non-Article III characteristics remain evident despite the Congressional name-changing action.

Enough has been said to indicate the dangers of such a facile legislative labeling process in dealing with the serious constitutional distinctions between legislative and Article III courts. Those are distinctions which only this Court can ultimately determine and resolve. And its decisions should remain final by virtue of its supreme power to interpret and apply the Constitution.

No reason is apparent why this Court's decisions in *Bakelite* and *Williams* should not be respected as to the still unchanged status of the Court of Customs and Patent Appeals. Accordingly, the 1958 amendment to 28 U.S.C. §211 must be considered void and of no effect. And the attempt to authorize the Chief Justice of the United States to assign a retired judge of such a legislative court to perform judicial functions in an Article III court must likewise fall.

Conclusion

For the foregoing reasons the judgment of the Court of Appeals for the District of Columbia Circuit should be reversed and petitioner allowed to proceed with his appeal *in forma pauperis*. On remand, the court below should hear and resolve the two non-frivolous issues raised on behalf of the petitioner, unless this Court in its discretion finds it appropriate to adjudicate either or both of these issues on their merits at this time.

Respectfully submitted,

EUGENE GRESSMAN
1730 K Street, N. W.
Washington 6, D. C.
Counsel for Petitioner
[By appointment of the Court of Appeals]

March 28, 1961